No. 77-1387

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 565 F. 2d 778. The opinion of the district court (Pet. App. 21a-45a) is reported at 413 F. Supp. 494.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on November 10, 1977. On January 27, 1978, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including March 10, 1978, and on March 2, 1978, he further extended the time to and including April 9, 1978. The petition was filed on March 29, 1978, and was granted on May 22, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal agency may defer public disclosure of statements of final policy decisions required to be disclosed by the Freedom of Information Act, where the brief delay is necessary to permit effective implementation of the agency's policy.

STATUTE AND REGULATION INVOLVED

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> > (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
> >
> > * * * * *
> >
> > (D) * * * statements of general policy * * * formulated and adopted by the agency * * *.
> >
> > * * * * *
> >
> > (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
> >
> > * * * * *

> > (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * *
> >
> > * * * * *
> >
> > * * * unless the materials are promptly published and copies offered for sale. * * *
> >
> > * * * * *
> >
> > (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person,
>
> (b) This section does not apply to matters that are—
>
> > * * * * *
> >
> > (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

2. 12 C.F.R. 271.5 provides:

> (a) *Deferred availability of information.* In some instances, certain types of information of the Committee are not published in the FEDERAL REGISTER or made available for public inspection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects de-

scribed in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities.

(b) *Reasons for deferment of availability.* Publication of, or access to, certain information of the Committee may be deferred because earlier disclosure of such information would

(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

(2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;

(3) Result in unnecessary or unwarranted disturbances in the securities market;

(4) Make open market operations more costly;

(5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

STATEMENT

A. The Federal Open Market Committee

1. The Federal Reserve System was created by Congress in 1913 as the nation's central bank. 38 Stat. 251. From the inception of the System, the 12 regional Reserve Banks have had authority under Section 14 of the Federal Reserve Act, 38 Stat. 264, to purchase and sell government securities in the open market. This authority initially was quite limited, and the Reserve Banks usually used it to accumulate funds to meet operating expenses rather than to accomplish monetary policy objectives.

As Reserve Banks made more extensive use of their open market authority during and following World War I, however, it became clear that open market operations were creating disturbances in the government securities market and that purchases or sales by one Reserve Bank might work to the detriment of another Reserve Bank. In addition, the governors of the Reserve Banks recognized before long that coordinated open market operations could become an effective tool of national monetary policy. See U.S. Board of Governors of the Federal Reserve System, *Annual Report* (Tenth) 13 (1923).

In 1922, in response to these concerns, the Reserve Banks formed the Committee on the Centralized Execution of Purchases and Sales of Government Securities, whose functions were to execute open market decisions made by the individual Reserve Banks in such a manner as to avoid market

disruptions and to make occasional non-binding recommendations to the Reserve Banks on the advisability of purchasing or selling securities. See Beckhart, *Federal Reserve System* 41 (1972). This committee was superseded the following year by the Federal Open Market Investment Committee, which was organized by the Federal Reserve Board (by then well aware of the significant credit-control aspects of open market operations). It was given a mandate not only to coordinate Reserve Bank transactions in government securities but also to devise and recommend plans for directing, supervising and controlling these transactions. In establishing this committee, the Board resolved

> that the time, manner, character, and volume of open market investments purchased by Federal Reserve banks be governed with primary regard to the accommodation of commerce and business and to the effect of such purchases or sales on the general credit situation.

1923 *Annual Report*, *supra*, at 16. See also Hearings on H.R. 7895 before the House Committee on Banking and Currency, 69th Cong., 1st Sess. 864 (1926). Although this committee and its successor, the Open Market Policy Conference, made frequent recommendations consistent with these guiding principles, each Federal Reserve bank retained the power to decide whether to participate in open market operations and, if so, whether to follow the committee's proposals.

The first major alteration of this structure was made by the Banking Act of 1933, Section 8, 48 Stat. 162, which created the Federal Open Market Committee (FOMC), consisting of one representative from each Reserve Bank. Although the FOMC, like the Investment Committee and the Policy Conference, could do no more than make policy recommendations to the Board for the conduct of open market operations, the Reserve Banks for the first time were prohibited from engaging in such operations except in accordance with the Board's regulations. Individual Reserve Banks were left free, however, to decline to participate in operations recommended and approved by the Board. Hence, accomplishment of FOMC objectives still depended on Board approval and the willingness of the Reserve Banks to cooperate.

The last vestiges of Board and Reserve Bank authority were eliminated by the Banking Act of 1935, 49 Stat. 705, which established the present Federal Open Market Committee and gave it complete control over the open market operations of the entire Federal Reserve System. See generally *Reuss* v. *Balles*, C.A. D.C., No. 77-1012, decided July 7, 1978, slip op. 8. This statute, which (with minor amendments) is in effect today, prohibited Reserve Banks from either engaging or declining to engage in the purchase or sale of securities in the open market except in accordance with "the direction of and regulations adopted by the Committee."

2. The FOMC, which is composed of the seven members of the Board of Governors of the Federal Reserve System and five representatives of the Reserve Banks, supervises the open market operations of the System by authorizing and directing Reserve Bank

purchases and sales of government securities and certain other securities in the domestic securities market. These operations are conducted through a combined investment pool, called the System Open Market Account, by the System's Account Manager in New York, under guidelines and instructions from the Committee (A. 46).[1]

The FOMC employs open market operations to influence the availability and cost of bank reserves, bank credit and money (A. 31). The total volume of bank reserves is increased when the Account Manager purchases securities in the open market, since the payment ordinarily is deposited in the seller's bank and credited to that bank's reserve account in its regional Reserve Bank. By the same token, when the Account Manager sells securities the sales price typically is deducted from the reserve account of the buyer's bank, thereby decreasing the volume of reserves held by member banks.[2] Changes in the volume

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[1] The FOMC regularly designates the Federal Reserve Bank of New York as its agent for the conduct of open market operations and appoints a senior officer of that Bank as Manager of the System Account (A. 31, 48).

[2] Open market operations by the Account Manager involve enormous sums of money. In 1974, for example, the total dollar volume of outright purchases and sales of United States government securities by the FOMC was approximately $19.4 billion, and the total volume of matched sale-purchase transactions and repurchase agreements was approximately $135 billion (A. 78). The Board advises us that in 1977 these figures totalled approximately $29.6 billion and $617.7 billion. The Account Manager generally buys or sells securities outright for prompt delivery when projections indicate a need

of member bank reserves necessarily influence the ability of these banks to make loans and investments.[3] This in turn has a substantial effect on interest rates on money market instruments, including the federal funds rate,[4] and on interest rates in the economy as a whole (A. 46-47, 77-78).

The Federal Reserve System considers its open market operations to be the System's most important monetary policy instrument, not only because of their prompt and direct effect on the level of reserves, but also because open market operations, unlike other

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to supply or to withdraw reserves for the banking system as a whole and this situation seems likely to persist for more than the current bank-statement-week. In situations where the need to provide or withdraw reserves seems only temporary, the Manager normally enters into repurchase agreements or matched sale-purchase transactions, neither of which has a lasting effect on the aggregate supply of reserves. See generally Federal Reserve Board, *The Federal Reserve System, Purposes and Functions* 60-65 (1974).

[3] Member banks are required by the Board's Regulation D, 12 C.F.R. Part 204, to hold reserves in a prescribed ratio to deposits. These banks typically respond to a reduction in the required reserve-to-deposit ratio or to an increase in available reserves by (i) making new loans and investments or (ii) selling their excess reserves to other member banks that are either short of reserves or need additional reserves in order to take advantage of particular lending and investment opportunities. As a result, deposits, loans and investments of the banking system expand almost to the limit permitted by the required reserve ratio (A. 47).

[4] The federal funds rate is the rate at which banks are willing to lend or borrow immediately available reserves on an overnight basis (A. 78). It is particularly sensitive to changes in the availability of reserves.

tools of monetary policy, are flexible and are in continuous use. This permits the FOMC to respond immediately to undesired changes in the economy, to implement changes gradually, and to probe in a given direction while maintaining the ability to withdraw from that course as necessary (A. 49, 53, 55).[5]

The FOMC meets approximately once a month to discuss policy objectives and to give policy guidance to the Account Manager for the period until the Committee's next meeting. The Committee's guidelines for the System's open market operations in the upcoming month are embodied in a Domestic Policy Directive, which is a statement of general monetary policy issued to the Federal Reserve Bank of New York (A. 47-48).[6] The Domestic Policy Directive includes the FOMC's objectives for the monetary aggregates;[7] these objectives are stated as tolerance

[5] Other major instruments of monetary policy include setting the discount rate and setting reserve requirements for commercial banks that are members of the Federal Reserve System. The instruments of monetary policy are complementary (A. 46).

[6] The affidavit of Governor Robert C. Holland of the Federal Reserve Board contains examples of the operative language of three Domestic Policy Directives (A. 82-83). See also A. 65-67.

[7] Monetary aggregates are the various definitions of the nation's money supply used by the Committee in its operations. The principal definitions are "M_1" and "M_2." "M_1" is the currency in circulation plus demand deposits held by the public in commercial banks, and "M_2" is "M_1" plus time and savings deposits, other than large certificates of deposit, held in commercial banks (A. 81).

ranges for growth of the money supply over specified periods of time and similar tolerance ranges for the federal funds rate (A. 43, 77).[8] From time to time, circumstances may require Committee members to consider changes in the tolerance ranges or other amendments to the Directive during the period between meetings (A. 43).

The Account Manager's day-to-day operations are guided by the Domestic Policy Directive, including the tolerance ranges for the money supply and federal funds rate, and by a daily conference call with the staff and at least one member of the FOMC. The Manager may buy or sell any quantity of several different kinds of securities, or he may do nothing at all. The choice of method is the Manager's, but in making that choice he must consider the Committee's instructions in light of developing conditions in the market (A. 78-79). Other members of the Committee are informed daily of the actions that the Manager expects to take in light of these conditions and the Committee's objectives (A. 48).

In transacting business for the System Open Market Account, the Manager trades with approximately 35 private dealers who actively make markets in United States government and federal agency securities. Approximately half of these dealers are

[8] For example, the tolerance ranges adopted in January 1975 were 3½ to 6½ percent growth for M_1, 7 to 10 percent growth for M_2, and 6½ to 7¼ percent for the federal funds rate (A. 81). (Prior to February 1977 the Committee did not incorporate the tolerance ranges in the Directive itself, but it expressed them in a supplement to the Directive.)

departments of large commercial banks, while the others include large, integrated brokerage firms and smaller firms specializing in the more active sectors of the Treasury and federal agency markets. All of these market participants buy principally, if not exclusively, for their own accounts (A. 33).

3. Section 10 of the Federal Reserve Act, as added, 49 Stat. 705, 12 U.S.C. 247a, requires the Board to keep a complete record of the actions taken by the FOMC on all questions of policy relating to open market operations.[9] The FOMC produces for each meeting a document called the Record of Policy Actions, which contains the Domestic Policy Directive (including the tolerance ranges) adopted at the meeting, the votes cast by Committee members in connection with open market policy, the reasons underlying the Committee's policy actions, and any dissenting views (A. 34, 42-44).

Pursuant to 12 C.F.R. 271.5, the Committee defers public availability of each month's Domestic Policy Directive until a few days after the following month's meeting.[10] Thereafter, the Directive is published in the *Federal Register*, made available for

[9] This section also directs the Board to make an annual report to Congress, including a full account of actions taken during the preceding year with respect to open market policies and operations.

[10] Prior to March 1975 the Committee deferred release of each Directive for 90 days (Pet. App. 5a n. 7). On March 24, 1975, the period of delay was shortened to 45 days. 40 Fed. Reg. 13204. The present policy was adopted on May 24, 1976. 41 Fed. Reg. 22261.

public inspection at the Board's Public Information Office as part of the Committee's Minutes of Actions,[11] and released to the press in the Record of Policy Actions (A. 42).[12]

B. The FOIA Litigation

On March 7, 1975, respondent, a law student with "a strong interest in administrative law and the operation of agencies of the federal government" and a desire to study "the process by which the FOMC regulates the national money supply through the frequent adoption of domestic policy directives" (A. 8), sought access under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the "Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies" (A. 13).

The FOMC advised respondent that, because of the Committee's delayed release policy, the records were not then available, but that they would be dis-

[11] The Minutes of Actions records all actions, including policy actions such as adoption of the Domestic Policy Directive, taken at the FOMC meeting (A. 35).

[12] The Record of Policy Actions is subsequently published in the monthly *Federal Reserve Bulletin* and in the Board's Annual Report (A. 44). The Board also publishes each week, or at other selected intervals, a number of statistical releases that disclose the results of the Committee's open market operations and much of the data on which its policy decisions are based (A. 36).

closed to the public in late March and early April 1975 (A. 15-16). Respondent appealed the delay in the release of the Records of Policy Actions (A. 19-20). By letter dated April 23, 1975, Governor Robert C. Holland of the Federal Reserve Board enclosed the requested documents, because by that time the 45-day withholding period then in effect had elapsed, but informed respondent that "the deferment of availability of such materials is founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies" (A. 21).[13]

Respondent commenced this litigation in May 1975 in the United States District Court for the District of Columbia, contending that 12 C.F.R. 271.5, under which the FOMC temporarily defers public release of the monthly Domestic Policy Directive and tolerance ranges, is contrary to the "prompt" disclosure requirements of the FOIA, 5 U.S.C. 552(a)(2)(B) and (a)(3) (A. 7-12).[14] Both parties moved for summary judgment. In support of its motion, the FOMC submitted several affidavits explaining

[13] Respondent also requested the January and February 1975 FOMC memoranda of discussion, which essentially are minutes containing a detailed account of the statements made and actions taken during the Committee's meetings (A. 13). Disclosure of these documents was refused under Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5) (A. 16), and an administrative appeal for the documents was denied (A. 21-22).

[14] The complaint also sought disclosure of the memoranda of discussion for the January and February 1975 FOMC meetings (A. 9).

that its policy of delaying public availability of the Directive and tolerance ranges for a short time had been adopted out of concern that the immediate disclosure of this information was likely to lead to exaggerated market reactions that would seriously interfere with the orderly execution of the Committee's monetary policies and could enable market participants engaged in the speculative trading of government securities to gain unfair profits and advantages (A. 49-51, 53-54, 56-58). Respondent did not submit any affidavit to rebut these contentions.

The district court granted summary judgment for respondent, holding that the Committee's records of its policy actions are not protected against disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because the records are not predecisional, but are the decisions themselves (Pet. App. 36a-37a).[15] The court also ruled that the FOMC's deferred release regulation, even if justified by reasons of monetary policy, failed to satisfy the Act's requirement of "current" and "prompt" disclosure (*id.* at 43a). Accordingly, the court ordered the Committee to cease enforcing 12 C.F.R. 271.5 insofar as it deferred public release of its records of policy actions, to publish the Domestic Policy Directive in the *Federal Register* on adoption, and to make its other policy actions, including statements and interpretations of

[15] The court also rejected the Committee's contention that deferred disclosure is supported by Exemption 2 of the FOIA, 5 U.S.C. 552(b)(2) (Pet. App. 32a-34a).

policy, available for public inspection without delay (Pet. App. 44a).[16]

The court of appeals affirmed, agreeing with the district court that the FOMC's Domestic Policy Directive and tolerance ranges are not predecisional, deliberative communications and that they therefore "cannot fall within Exemption 5's incorporation of the deliberative process privilege" (Pet. App. 10a). The court of appeals acknowledged that disclosure of some final decisions might be deferred until they take effect (*id.* at 12a n.16), but it rejected the related contention that the legislative history of the FOIA shows that Congress intended to prevent premature disclosure of even final and effective decisions where too-prompt disclosure would inhibit the effectiveness of an agency's policy (*id.* at 11a). The court reasoned that, "even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require [immediate] disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (*id.* at 14a; footnotes omitted). Because it was unaware of any civil discovery privilege recognized at the time that the FOIA was passed that would protect the Directive and tolerance ranges from disclosure (*id.* at 15a-18a), the court of appeals concluded that they must be released as soon as they are adopted.

[16] In addition, the district court ordered disclosure of any reasonably segregable facts in the two requested memoranda of discussion (Pet. App. 41a-42a). The parties then agreed on the factual portions of these memoranda to be produced, and this aspect of the district court's order is not at issue here (*id.* at 5a n. 6). Moreover, after the district court entered its order the FOMC changed its deferral policy to make available all records of policy actions within a few days following the Committee's next scheduled meeting. See page 12 and note 10, *supra*. Because the Record of Policy Actions is not completed and formally adopted until the meeting after the meeting to which it relates, respondent conceded in the court of appeals that the Committee's new guidelines for release of that document are consistent with the FOIA (*id.* at 7a).

SUMMARY OF ARGUMENT

A. Exemption 5 of the Freedom of Information Act authorizes the nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(5). This exemption was intended to protect documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Although the exemption's primary purpose is to prevent disclosures that might adversely affect the deliberative process, the legislative history of the FOIA demonstrates that Exemption 5 also protects against the *premature* disclosure of agency plans.

In the congressional hearings, a number of federal agencies expressed concern that agency plans, negotiating positions, and similar "final" decisions—including the Federal Reserve System's instructions for the conduct of open market operations—would have to be disclosed before they could be carried out. The

committee reports indicate that Congress responded to these concerns through Exemption 5, which was expressly designed to prevent disclosure of agency plans and instructions prior to their implementation, "where premature disclosure would harm the authorized and appropriate purpose for which they are being used." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967).

B. The unanswered affidavits in this case show that premature release of the Federal Open Market Committee's monthly Domestic Policy Directive and tolerance ranges is likely to impair the Committee's ability to perform its important monetary policy functions. Open market operations permit the FOMC to implement monetary changes gradually, and this moderate, probing approach is essential to the success of the Committee's policies. Immediate disclosure of the Directive and tolerance ranges would have an "announcement effect," resulting in rapid changes in securities prices and interest rates. Moreover, the sudden movements might be larger than the FOMC contemplated, and if the Committee's instructions should be misinterpreted by market participants prices and rates could move in a direction opposite to that desired by the Committee. These unfortunate consequences not only would impede the FOMC's ability to achieve the nation's economic goals but also would increase the volatility of rates of interest, which could increase the government's

debt financing costs by as much as $300 million annually.

C. The protections provided by Exemption 5 against premature disclosure of agency plans and instructions do not end abruptly once the plans or instructions have been finally adopted. Since predecisional memoranda always were considered to be within the scope of the exemption, the court's construction renders meaningless the congressional attempt to address the significant additional concerns noted by the federal agencies. Unless Exemption 5's safeguards are wholly illusory, agency decisions such as contract bids, negotiating positions, offers to purchase or sell property, and the FOMC's instructions to its Account Manager must be exempt from disclosure until they are carried out, regardless of whether the agency's decision may be characterized as "final" prior to its implementation.

The court of appeals also erred in holding that, even if Congress specifically drafted Exemption 5 to cover the FOMC's instructions, public disclosure would still be required unless the material would not be available to a litigant under established rules of civil discovery. If, as we argue, Congress intended to allow agencies to withhold temporarily materials such as the Domestic Policy Directive and tolerance ranges, then the courts possess an equitable discretion to fashion an FOIA disclosure order to achieve that result. No principle of statutory construction requires a court to give Exemption 5 a wooden reading that undermines both the purposes of the FOIA and the ability

of the FOMC to formulate and carry out monetary policy.

In any event, at least three recognized privileges would prevent a party in litigation with the FOMC from gaining access to the Directive and tolerance ranges during the month that they are operative: the governmental privilege for official information whose disclosure would be harmful to the public interest; Fed. R. Civ. P. 26(c)(7), which authorizes the issuance of protective orders during discovery in order to protect "confidential * * * commercial information"; and Fed. R. Civ. P. 26(c)(2), which allows a court to limit discovery "on specified terms and conditions, including a designation of the time or place." Because privileges available in discovery are also available under Exemption 5, the statute allows the FOMC to defer release to the same extent that would likely be authorized by a protective order under Rule 26(c).

D. A short postponement in release of the Domestic Policy Directive and tolerance ranges would not frustrate any of the purposes underlying the FOIA. Since the instructions are not rules that govern the adjudication of individual rights or require particular conduct or forbearance by the public, a temporary withholding of the information would not be contrary to the policy against "secret agency law." Moreover, because each month's Directive and tolerance ranges, as well as substantial other materials concerning the FOMC's open market operations, are made freely available within days of the

Committee's next monthly meeting, a delay in disclosure would not prevent informed public scrutiny of the Committee's policies.

ARGUMENT

THE FEDERAL OPEN MARKET COMMITTEE'S MONTHLY DOMESTIC POLICY DIRECTIVE AND TOLERANCE RANGES ARE PROTECTED FROM PREMATURE DISCLOSURE BY EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT

A. Exemption 5 Was Intended To Allow Agencies To Prevent Premature Release Of Final Agency Decisions

The Freedom of Information Act "establish[es] a general philosophy of full agency disclosure * * *." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). At the same time, the Act recognizes that it is "necessary for the very operation of our Government to allow it to keep confidential certain material * * *" (*ibid.*). To accommodate these competing interests, the FOIA makes available "to any person" all "identifiable" agency documents, which it divides into three categories: some must be published in the *Federal Register* (5 U.S.C. 552(a)(1)); others must be published or made publicly available and indexed (5 U.S.C. 552(a)(2)); and all others must be furnished on request (5 U.S.C. 552(a)(3)). The FOIA then defines nine categories of documents to which the Act "does not apply" (5 U.S.C. 552(b)). Thus, as the Court observed in *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 262, "Congress sought to permit access to certain kinds of

official information which it thought had unnecessarily been withheld and, by the creation of nine explicitly exclusive exemptions, to provide a more workable and balanced formula that would make available information that ought to be public [while shielding] * * * certain information where confidentiality was necessary to protect legitimate governmental functions that would be impaired by disclosure."

Exemption 5 of the FOIA permits the nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This exemption is designed to protect from mandatory disclosure internal government documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Accordingly, Exemption 5 "exempt[s] those documents * * * normally privileged in the civil discovery context" (*National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149) and "contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 91.

Although the exemption's principal function is to avert disclosure of internal, non-final communications that might affect the deliberative process by deter-

ring uninhibited discussion in matters concerning policy-making and decision-making (see S. Rep. No. 813, *supra*, at 9; *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 86-87), that is not its only purpose. The legislative history of the FOIA demonstrates that Exemption 5 also was designed to protect against the *premature* disclosure of final agency plans. See Davis, *Administrative Law Treatise* § 3A.21, p. 157 (1970 Supp.); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 Md. L. Rev. 189, 213 (1972); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 Tex. L. Rev. 1261, 1272 (1970).[17]

The initial draft of the proposed Exemption 5 of the FOIA excluded from mandatory disclosure "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy." Hearings on S. 1160, etc. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 7 (1965). In congressional hearings prior to enactment of the bill, a number of federal agencies ob-

[17] The two purposes are not wholly distinct. Here, for example, the FOMC's deliberative processes certainly would be affected by the knowledge that its formal decisions would be released prematurely. A rule requiring immediate disclosure thus might persuade the Committee to resort to informal understandings with the Account Manager, to adopt language in the Directive aimed at counteracting anticipated market sense to protect the decision-making process while at the same response to the disclosure, or to employ other tactics not conducive to reasoned policy-making. Moreover, it makes little time mandating hasty disclosures that would render the decision itself ineffective or counterproductive.

jected that this language would require them, to their detriment, to disclose plans, negotiating positions, contract bids, and other "final" decisions before those plans or instructions had been carried out. For example, the Department of Defense expressed concern that information relating to its plans to acquire or dispose of materials, real estate or other property might not be protected (*id.* at 418); the General Services Administration stressed the need to avoid disclosure of information whose early release would prejudice the government's bargaining position in business transactions, "such as expected prices on stockpile sales, expected realization estimates on Government mortgage foreclosures, expected ultimate purchase or sale prices" (*id.* at 480); and the Post Office Department urged that in matters such as the negotiation of contracts and service arrangements it should stand on the same footing as a private party (Hearings on H.R. 5012, etc. before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 224 (1965)). Also among the witnesses was the Acting General Counsel of the Department of the Treasury, who testified (Hearings on H.R. 5012, etc., *supra*, at 49; emphasis added):

> Information as to purchases by the Federal Reserve System, for example, of Government securities in the market, if prematurely disclosed could have, we feel, serious effects on the orderly handling of the Government's financing requirements so that in all of these things there is a question of timing. There are many things

> on which full disclosure is made in reports which are published or filed with the Congress with a timelag, *there is no basic secrecy about these matters, and yet the premature release of these could be very damaging to the general interest.*

Congress responded to these concerns by amending the language of Exemption 5 to its present form. The House Report on the FOIA stated (H.R. Rep. No. 1497, *supra*, at 5-6):

> [I]n some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure, and S. 1160 [the bill that became the FOIA] is designed to permit nondisclosure in such cases.

Accordingly, with respect to Exemption 5, the Report explained (H.R. Rep. No. 1497, *supra*, at 10):

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.

The Senate Report similarly construed the coverage of the exemption (S. Rep. No. 813, *supra*, at 9):

> It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

These statements "make it clear that the Congress did not intend to require the production of [internal government] documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967). Exemption 5 incorporates this intent and protects the FOMC from a requirement that it precipitously release information that would adversely affect its operations.

B. Disclosure Of The Domestic Policy Directive And Tolerance Ranges Prior To Their Implementation Would Seriously Impede The Successful Performance Of The FOMC's Monetary Policy Functions

The unanswered affidavits in this case demonstrate that a brief delay in disclosure of the FOMC's Domestic Policy Directive and tolerance ranges "is an essential element to the effectiveness of open market operations" (A. 54) and that the premature release of these documents "is likely to * * * seriously impede" the "ability of the FOMC to perform its monetary policy functions" (A. 79). As Governor Holland explained, "[o]ne of the most useful aspects of open market operations as a tool of monetary policy is its usefulness in implementing changes gradually or in enabling the FOMC to probe in a given direction while maintaining the ability to withdraw from that course if necessary" (A. 49). This moderate approach is essential to the success of the Committee's policy, because "[e]conomic and financial *stability* is a prime objective of a central bank; and gradual change is often desirable in order to minimize the risk that businessmen, consumers, and investors will overreact and cause economic conditions to worsen, either in the direction of inflation or of recession" (A. 79; emphasis in original).

Immediate public disclosure of the Directive and tolerance ranges would have an "announcement effect" on financial markets, characterized by abrupt movements of securities prices and interest rates as market participants hastened to realize gains in anticipation of the FOMC's purchases or sales of securities (A. 79). To cite just one example, if market participants believed, after viewing the tolerance ranges, that the federal funds rate was likely to rise, many would react immediately by selling securities, which would tend to depress securities prices and inflate interest rates unnaturally (A. 57).[18] The

[18] The greatest speculative profits would accrue to those large or institutional market participants who accurately assessed the Directive and acted rapidly in buying or selling securities (A. 50, 56, 80). Other investors, without freely

sudden price and rate movements would be contrary to the moderate, gradual reaction traditionally sought by the FOMC; perhaps more important, price and rate movements often might be considerably larger than the Committee contemplated and might be beyond the power of the FOMC or the Federal Reserve System to control (A. 56). Market participants on occasion might also misinterpret the Directive and tolerance changes, leading to unintended and unwelcome changes that would have to be overcome by further market activity of the Committee (A. 50-51, 79-80). None of these consequences could be forecast with any precision; each would interfere with the FOMC's efforts to achieve important and coordinated monetary policy objectives.

Finally, disclosure of the Directive and tolerance ranges during the period of their effectiveness would make borrowing operations more costly for the government by imposing substantial additional expenses on its debt financing.[19] The Department of the Treasury relies heavily on dealers in government securities

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available resources to buy or sell immediately, would be disadvantaged by acting after the "announcement effect" had already run its course (A. 50).

[19] The FOMC's policy of deferring the availability of its Domestic Policy Directive long antedates the enactment of the FOIA. See, *e.g.*, Section 6(d), Federal Open Market Committee, *Rules on Organization and Information and Rules of Procedure* (1946); 12 C.F.R. 271.3(d) (1963). The Committee consistently has offered almost all of the reasons we discuss here as reasons for deferring disclosure, and its regulations for more than 30 years have set out and discussed these reasons at length.

to help distribute its offerings. In fulfilling their obligation to make regular markets, these dealers stand ready, on request, to quote firm bid and offer prices on government securities and to do business at these prices. As a result of the sharper fluctuations in interest rates that would inevitably occur from early release of the Directive and tolerance ranges, risks to dealers underwriting these securities as well as to the ultimate purchasers of the securities (in the form of a greater chance to incur capital losses on fixed-income assets) would be increased. This increase in risk would be accompanied by an increase in yields to compensate the risk-takers.[20] Although it obviously is impossible to predict the magnitude of this increase, the FOMC's staff has estimated that these additional borrowing costs could approach $300 million annually, given the publicly held marketable debt of approximately $350 billion. This amounts to an increase of but eight basis points (.08 percent) in the rate of interest on account of the increased market volatility.[21]

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[20] The increase in the rate of interest associated with an increase in uncertainty is a well-documented economic phenomenon. See, *e.g.*, Lorie and Hamilton, *The Stock Market: Theories and Evidence* chs. 11-12 (1973).

[21] The figure of eight basis points represents the midpoint of the range of increased interest rates attributable to an assumed ten percent increase in market volatility, augmented by a factor representing the anticipated widening of the spread between dealer bid and offering rates to the public. This figure was derived from relationships estimated in published studies. See, *e.g.*, Fama, *Forward Rates as Predictors of Future Spot Rates*, 3 Journal of Financial Economics 361-377 (1976);

C. The Domestic Policy Directive And Tolerance Ranges Would Be Exempt From Immediate Disclosure In Civil Discovery Proceedings

Despite the clear evidence in the legislative history of the FOIA that Exemption 5 was drafted to authorize a brief delay in disclosure in precisely the type of situation presented in this case, the court of appeals refused to "infer * * * that Congress contemplated that a final policy decision such as the one at issue here could be kept secret until executed. The policy directives are 'issued' to the Account Manager upon adoption, and they become immediately effective and govern his open-market transactions" (Pet. App. 12a).[22] The court viewed the statements in the House and Senate reports (see pages 25-26, *supra*) only as "illuminat[ing Congress's] concern centering on predecisional materials the exposure of which would be premature because injurious to the deliberative process. It does not indicate that a final

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Modigliani and Shiller, *Inflation, Rational Expectations, and the Term Structure of Interest Rates*, Economica 12-43 (February 1973); Garbade and Rosey, *Secular Variation in the Spread Between Bid and Offer Prices on U.S. Treasury Coupon Issues*, Business Economics 45-49 (September 1977).

[22] The FOMC argued below that its Directive and tolerance ranges are predecisional guidelines protected from disclosure by Exemption 5, and that the *final* decision is made by the Account Manager in buying or selling securities in the open market. Although we believe that the court of appeals' rejection of this argument is incorrect, we have not presented the issue to this Court because the question depends essentially on an analysis of the particular nature of the instructions given to the Account Manager and the role played by that official in the Committee's open market operations.

and effective policy decision may be withheld" (*id.* at 12a-13a). This conclusion misreads the congressional intent.

The principal concern voiced by a number of federal agencies during the hearings on the FOIA was that in some circumstances governmental operations would be significantly impaired if agency plans or policies had to be disclosed before they could be implemented (see pages 23-25, *supra*). As the court of appeals conceded, Exemption 5 was designed to protect such plans or policies from premature disclosure. But since Exemption 5—like the draft that was rewritten in response to the agencies' objections—unquestionably allows the withholding of *predecisional* memoranda,[23] the court's interpretation essentially renders meaningless the congressional attempts to address the problem of premature disclosure raised by the federal agencies. Congress could not have desired to draw an arbitrary line at the point at which "final" instructions were issued to the government official with responsibility for carrying them out. Federal agencies, for example, often issue directions to their employees on the maximum price to pay for equipment or real estate. The ceiling, one would suppose, is a final decision, but surely not one to be disclosed to the seller until the sale has been negotiated. Disclosure unquestionably was to be delayed in such circumstances, whether or not the agency decision to set a ceiling could be characterized as "final."

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[23] See *National Labor Relations Board* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150-154.

Equally unjustified, in light of the compelling legislative history, is the court of appeals' conclusion that, "even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (Pet. App. 14a; footnotes omitted). This unyielding interpretation of Exemption 5 would result in the very kind of "wooden" exemption that Congress sought to avoid. See *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 91. If, as we have argued, Congress intended Exemption 5 to grant some discretion to prevent premature release of decisions, then the seemingly mandatory language employed in the statute does not deprive the courts of their equitable discretion to fashion a FOIA disclosure order to achieve Congress's purpose. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 141.[24]

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[24] See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20-25; *Rose* v. *Department of the Air Force*, 495 F. 2d 261, 269 and n. 23 (C.A. 2), affirmed, 425 U.S. 352; *Consumers' Union of United States, Inc.* v. *Veterans' Administration*, 301 F. Supp. 796, 806 (S.D. N.Y.), appeal dismissed as moot, 436 F. 2d 1363 (C.A. 2). See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 767 (1967), and Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 914 (1974), which acknowledge that Congress intended to leave room for the operation of a limited judicial discretion in enforcement of the FOIA. Compare *Tennessee Valley Authority* v. *Hill*, No. 76-1701, decided June 15, 1978, slip op. 38-40. Moreover, the bare language of a statute is not sufficient to prevent judicial implementation of a clearly disclosed legislative design. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1. Here, for the reasons we have set out, the legislative history of Exemption 5 establishes an especial flexibility.

The court of appeals stated (Pet. App. 16a n. 22) that disclosure was required, despite any equitable considerations, because Congress had rejected "the public interest standard in favor of [a] broad disclosure policy * * *." This consideration may be persuasive when an agency seeks to withhold on equitable grounds a particular document from an otherwise disclosable category of documents. It may even be persuasive in assessing a contention that the public interest requires that a particular category of documents not be disclosed. But the court's unwillingness to entertain equitable arguments is quite inappropriate, we submit, when the question is not disclosure versus nondisclosure, but only disclosure now versus disclosure 30 days from now.

Be that as it may, the court of appeals was mistaken in its assessment of civil discovery procedures. At least three privileges would allow a district court in a civil proceeding to delay routine discovery of documents such as the Domestic Policy Directive and tolerance ranges until they were no longer operative. Because Exemption 5 incorporates all of these privileges,[25] it shields the documents from a requirement of premature disclosure.

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[25] Although the Court has held that Exemption 5 "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context" (*Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184), these rules "can only be applied under Exemption 5 by way of rough analogies." *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 86. Moreover, the discovery rules themselves are not hard and fast; "[i]n many important respects, the rules governing discovery in

1. In addition to the government's privilege for military and state secrets (see *United States* v. *Reynolds*, 345 U.S. 1), the courts have recognized a privilege for official government information whose disclosure would be harmful to the public interest. See American Law Institute, *Model Code of Evidence*, Rule 228(b) (1942); Annot., 32 A.L.R. 2d 391, 393 (1953). As one commentator has observed, "[t]hat the sensitive area of any official data, the disclosure of which is demonstrably detrimental to the public interest, as well as the more obvious areas of military and state secrets, are entitled to immunity in discovery and inspection proceedings, as in the course of a trial, is an entrenched common-law evidentiary rule." 12A Bender's *Forms of Discovery* § 5.112, p. 659 (1972).

In *Machin* v. *Zuckert*, 316 F. 2d 336, 339 (C.A. D.C.), certiorari denied, 375 U.S. 896, for example, the court upheld a claim of privilege by the Secretary of the Air Force with respect to witness statements given to an Air Force accident safety board, because disclosure of the reports "would hamper the efficient operation of an important Government program * * *." The same reasoning was applied to deny a FOIA request in *Brockway* v. *Department of Air Force*, 518 F. 2d 1184, 1194 (C.A. 8). See also

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* * * litigation [with the government] have remained uncertain from the very beginning of the Republic" (*ibid.*). Accordingly, the interpretation of Exemption 5 is to "be governed by the same flexible, commonsense approach that has long governed private parties' discovery" of information during litigation with the government (*id.* at 91).

Cooper v. *Department of the Navy*, 558 F. 2d 274, 277 (C.A. 5). This principle would operate in civil discovery to protect the FOMC's monthly instructions from public release until they were fully executed by the Account Manager, for the premature disclosure of the instructions would impair the FOMC's ability to carry out the instructions with the desired effects.[26]

2. The Domestic Policy Directive and tolerance ranges also would be protected from civil discovery during their operative period by Fed. R. Civ. P. 26 (c)(7), which limits the disclosure of "confidential * * * commercial information." This provision allows courts to restrict the dissemination of commercial information that, while perhaps not privileged, may nevertheless be quite sensitive. See 4 Moore's *Federal Practice* ¶ 26.60[4], p. 26-247 (2d ed. 1976); *Corbett* v. *Free Press Association, Inc.*, 50 F.R.D. 179 (D. Vt.); *Rosenblatt* v. *Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D. N.Y.). Accordingly, courts have entered protective orders either authorizing the nondisclosure of confidential commercial information (see *Roto-Finish Co.* v. *Ultramatic Equipment Co.*, 60 F.R.D. 571 (N.D. Ill.)), or limiting

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[26] The privilege for official governmental information applied in *Machin* is qualified, since it depends on a showing of harm to the public interest. It would therefore be inapplicable in circumstances where, because of the passage of time, disclosure of the information would no longer be detrimental to the public interest. See *Brown* v. *Thompson*, 430 F. 2d 1214, 1215 (C.A. 5); *Capitol Vending Co.* v. *Baker*, 35 F.R.D. 510 (D. D.C.).

access to the disclosed materials (see, *e.g.*, *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 999 (C.A. 10), certiorari denied, 380 U.S. 964; *Xerox Corp.* v. *International Business Machines Corp.*, 64 F.R.D. 367 (S.D. N.Y.); *Schwartz* v. *Broadcast Music, Inc.*, 20 Fed. Rules Serv. 494, 495 (S.D. N.Y.)), or, most significant for present purposes, delaying release of the information until a greater showing of need has been made or the reasons for the material's sensitivity have passed. See, *e.g.*, *DuPont Powder Co.* v. *Masland*, 244 U.S. 100, 103; *Rosenblatt* v. *Northwest Airlines, Inc.*, *supra*, 54 F.R.D. at 23-24; *Capitol Vending Co.* v. *Baker*, 35 F.R.D. 510 (D. D.C.). The Directive and tolerance ranges are the kinds of information that would fall squarely within Rule 26(c)(7). During the month that the instructions provide guidance to the Account Manager they undoubtedly are confidential, and the information is commercial in nature because it relates to the buying and selling of securities on the open market.

3. Even if, as the court of appeals believed (Pet. App. 17a), the Domestic Policy Directive and tolerance ranges would not be considered "commercial" because they involve governmental operations, a district court would still be empowered by Fed. R. Civ. P. 26(c)(2) to issue a protective order delaying their disclosure in civil litigation. Rule 26(c)(2) grants a court broad authority to order that discovery, otherwise mandated by the rules, "may be had only on specified terms and conditions, *including a designation of the time* or place" (emphasis added).

This provision frequently has been invoked to postpone the release of information, including information sought from the government, for short periods of time, in the interests of justice. See, *e.g.*, *Brennan* v. *Local U. No. 639*, 494 F. 2d 1092, 1100 (C.A. D.C.), certiorari denied, 429 U.S. 1123; *Campbell* v. *Eastland*, 307 F.2d 478, 487-488 (C.A. 5), certiorari denied, 371 U.S. 955; cf. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290-298. See generally 4 Moore's *Federal Practice*, *supra*, *at* ¶ 26.70[2], pp. 26-520 to 26-524.

D. A Brief Delay In Disclosure Of The Domestic Policy Directive And Tolerance Ranges Would Not Frustrate Any Of The Interests That The FOIA Was Designed To Advance

The discussion thus far has demonstrated that Exemption 5 of the FOIA was intended to allow agencies to prevent premature disclosure of "final" decisions such as the FOMC's Domestic Policy Directive and tolerance ranges, that the release of this information would inflict serious harm to the Committee's efforts to manage the nation's monetary policy, and that the information would not be available routinely to a party in litigation with the Committee. But this is only part of the picture. An assessment of the FOMC's deferred release policy also must consider whether a short postponement in disclosure of the materials would be inconsistent with any of the purposes underlying the Freedom of Information Act. We submit that it would not.

To begin with, a temporary withholding of the materials would not contravene the "strong congressional aversion to 'secret [agency] law'" (*National Labor Relations Board* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 153), because the FOMC's instructions apply only to its Account Manager. The Directive and tolerance ranges are not "law," and therefore cannot be "secret law," because they are not rules that govern the adjudication of individual rights or require particular conduct or forebearance by the public (A. 77). See *Cuneo* v. *Schlesinger*, 484 F. 2d 1086, 1091 n. 13 (C.A. D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

By the same token, a delay in disclosure would pose no threat to open government and would do nothing to frustrate public scrutiny of governmental policies. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17. True, "the dominant objective of the Act" is "disclosure, not secrecy" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 361), but the FOMC's regulations require that the Directive and tolerance ranges for each month, as well as other records that explain in greater detail the economic policy pursued by the Committee, are to be made freely available shortly after the succeeding month's meeting. Respondent's sole purported interest in examining these documents is to study "to what extent current economic and financial factors are taken into consideration by the FOMC in the adoption of its domestic policy directives and other policy actions" (A. 8). Access to the Committee's decisions for

all but the most recent monthly period would fully satisfy his academic needs and would provide an ample record for him or any other person to evaluate the Committee's performance. These prompt and complete disclosures surely are adequate "to ensure an informed citizenry * * * and to hold the governors accountable to the governed." *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-991, decided June 15, 1978, slip op. 27. See also *id.* at 28 ("we cannot see how FOIA's purposes would be defeated by deferring disclosure" of NLRB witness statements for a short period of time).

In a previous case involving the proper interpretation of the Freedom of Information Act, this Court remarked:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

Environmental Protection Agency v. *Mink*, *supra*, 410 U.S. at 80 n.6, quoting from S. Rep. No. 813, *supra*, at 3. The court of appeals ignored these basic principles in ordering immediate release of the FOMC's Domestic Policy Directive and tolerance ranges, a disclosure that would disrupt important economic policy without any corresponding public benefit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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